Filed 11/17/16 P. v. Garibay CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ADAN CRUZ GARIBAY, Defendant and Appellant.	B270656 (Los Angeles County Super. Ct. No. BA440702)

APPEAL from a judgment of the Superior Court of Los Angeles County. Laura F. Priver, Judge. Reversed and remanded with directions.

Richard L. Fitzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stacey S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Adan Cruz Garibay appeals from a judgment sentencing him to two years in a county jail after he pleaded no contest to a violation of Penal Code section 21310, carrying a concealed dirk or dagger.[1] Garibay contends the court should have suppressed evidence of a weapon found on his person after a frisk because the arresting officer failed to articulate sufficient facts to support his belief that Garibay was armed and dangerous. We agree and reverse.

BACKGROUND

On October 14, 2015, around 10:50 p.m., a Los Angeles Police Department officer spotted Garibay and another man standing in the carport of an apartment complex under "No Loitering" and "No Trespassing" signs. The officer testified the area was a known "gang hangout," and gang-related graffiti tagged a nearby wall. Several empty 40-ounce beer bottles rested on a car trunk nearby. The officer approached the men. Garibay appeared drunk. Upon questioning, the men admitted they neither lived in nor knew any resident of the complex. The officer then frisked Garibay. He recovered a necklace that had a small sheathed knife with a fixed blade hanging from it. The officer arrested Garibay for carrying a concealed dirk or dagger in violation of section 21310.

Garibay pleaded no contest to an information filed against him alleging one count of violating section 21310. Garibay's trial counsel argued twice, once at the preliminary hearing and once before trial, that the evidence of the weapon should be suppressed because the officer unlawfully searched Garibay. The court disagreed, however, and received the evidence into the record. The court sentenced Garibay to two years in a county jail. Garibay appealed.

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[1] Undesignated statutory references are to the Penal Code.

DISCUSSION

On appeal, Garibay contends the court erred in not suppressing the evidence because the officer failed to give sufficient facts to support his belief that Garibay was armed and dangerous. We agree.

In ruling on a motion to suppress, if the defendant does not dispute facts and applicable law, " 'the trial court . . .determine[s] whether the rule of law as applied to the established facts is or is not violated,' " and this " 'mixed fact-law question that is . . . predominantly one of law' " is " 'subject to independent review.' (*People v. Williams* (1988) 45 Cal.3d 1268, 1301.)" (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.) Here, Garibay disputes neither the facts nor the law, and we therefore independently review his argument that the trial court misapplied the Fourth Amendment's protections to his search.

"The Fourth Amendment guarantees the right to be free of unreasonable searches and seizures by law enforcement personnel." (*In re H.M.* (2008) 167 Cal.App.4th 136, 142 (*H.M.*).) When, however, "an officer reasonably suspects that an individual whose suspicious behavior he or she is investigating is armed and dangerous to the officer or others, he or she may perform a patsearch for weapons. (*Terry v. Ohio*, [(1968) 392 U.S. 1], 24, 30; [citations].) . . . A patsearch is a 'serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.' (*Id*. at p. 17, fn. omitted.) On the other hand, law enforcement officers have a legitimate need to protect themselves even where they may lack probable cause for an arrest. (*Id*. at p. 24.) The officer has an immediate interest in taking steps to ensure that the person stopped 'is not armed with a weapon that could unexpectedly and fatally be used' against the officer. (*Id*. at p. 23.)" (*H.M.*, at p. 143.) "Such a limited

frisk for weapons is justified where the officer 'can point to specific and articulable facts which, considered in conjunction with rational inferences to be drawn therefrom, give rise to a reasonable suspicion that the suspect is armed and dangerous.' " (*Ibid.*, quoting *People v. Medina* (2003) 110 Cal.App.4th 171, 176.)

The Attorney General offers the following facts as supporting the search: "(1) appellant was trespassing; (2) appellant appeared to be drunk and had open containers near him; (3) it was a high gang crime area; (4) it was late at night; (5) [the officer] suspected appellant was a gang member; and (6) gang members in the area have a propensity to carry weapons." We consider each fact.

First, the facts that the area was high in crime and it was night alone are insufficient. (*People v. Limon* (1993) 17 Cal.App.4th 524, 534 (*Limon*) [upholding a stop, but clarifying that a high crime area alone does not justify a stop]; *People v. Souza* (1994) 9 Cal.4th 224, 241 [acknowledging that night is a relevant factor, but reasoning that 3:00 a.m. " 'is both a late and unusual hour for anyone to be in attendance at an outdoor social gathering' "].) If these facts were sufficient, law enforcement would have an excuse to frisk any person at night in a high crime area. The Fourth Amendment prohibits such broad searching power. (*People v. Loewen* (1983) 35 Cal.3d 117, 124.) " 'The "high crime area" factor is not an "activity" of an individual. Many citizens of this state are forced to live in areas that have "high crime" rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas' " (*ibid.*) and therefore cannot alone justify a search.

Adding the fact that Garibay appeared drunk does not justify the search either. The officer testified that drinking and loitering in a known gang area near gang graffiti is activity associated with gang membership and not the "average person." Officers may indeed "draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person' " (*United States v. Arvizu* (2002) 534 U.S. 266, 273), and a "police officer's expertise can attach criminal import to otherwise innocent facts" (*Limon*, *supra*, 17 Cal.App.4th at p. 532). Here, however, Garibay was cooperative and was not acting erratically or combatively, furtively moving, or attempting to flee. If the additional fact of inebriation provided justification here, it would give law enforcement broad power to search any person who appeared drunk in a high crime area at night. Again, the Fourth Amendment protects against such broad searching powers where specific and individual facts indicating danger are unarticulated.

The addition of Garibay's trespass also does not make the articulated facts sufficient. Trespass is not an inherently dangerous crime and, in this instance, the officer plainly spotted Garibay standing in a well-lit carport. The officer testified that Garibay did not attempt to flee or deceive him about the trespassing. Without further facts as to why the officer thought Garibay's trespass made him more likely to be armed and dangerous, this fact in combination with the other facts discussed above is insufficient.

Finally, the officer testified that he suspected Garibay was a gang member. Even assuming Garibay was a gang member, the officer failed to state why he believed Garibay *himself* was armed. The officer admitted he could not see any bulge under Garibay's clothes that would indicate a concealed weapon, and Garibay made no furtive movements otherwise

indicating a concealed weapon. "Mere membership in a street gang is not a crime" (*People v. Rodriguez* (1993) 21 Cal.App.4th 232, 239), and without additional facts as to why Garibay's suspected gang membership made him more likely to be armed, this fact, even in combination with the other facts, is insufficient. The Attorney General argues the officer testified that gang members in the area are more likely to carry weapons, but a careful reading of the record does not reflect that testimony. In fact, and in contrast, the officer testified the local gangs "get along" and are not rivals.

Although we agree officer safety is important, a warrantless search must be supported by sufficient articulable facts suggesting that the suspect was armed and dangerous to satisfy the Fourth Amendment. Here, the facts given in the officer's testimony did not support the search. We reverse and remand with directions.

DISPOSITION

The judgment is reversed. The matter is remanded to allow Garibay to withdraw his plea and for further proceedings in accordance with the views expressed herein.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.